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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

DANIEL ALLEN TEMPLE,

Plaintiff and Appellant,

vs.

No. 14232

SAMUEL W. SMITH, Warden
Utah State Prison,

Defendant and Respondent.

BRIEF OF APPELLANT

Appeal from an Order of the Third District
Court for Salt Lake County, State of Utah,
the Honorable Marcellus K. Snow, Judge,
presiding.

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
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Defendant and Respondent.

BRIEF OF APPELLANT

Appeal from an Order of the Third District
Court for Salt Lake County, State of Utah,
the Honorable Marcellus K. Snow, Judge,
presiding.

STATEMENT OF THE KIND OF CASE

This is an action seeking an extraordinary writ in the
nature of habeas corpus challenging appellant's confinement
by respondent at the Utah State Prison.

DISPOSITION IN LOWER COURT

The case was tried to the court. From an Order denying
the issuance of a writ of habeas corpus, the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment, and judgment in his favor as a matter of law. The specific relief sought is immediate release on parole status from the Utah State Prison or that failing, a new hearing before the Utah State Board of Pardons with petitioner being afforded those procedural due process protections afforded persons facing parole revocation, including the assistance of counsel.

STATEMENT OF FACTS

Plaintiff was originally confined at the Utah State Prison pursuant to a sentence of one-to-ten years for a conviction of grand larceny imposed by the Third Judicial District Court for Salt Lake County on December 1, 1969. On September 27, 1972, he appeared before the Utah State Board of Pardons and was granted a parole release date of March 12, 1974. On March 12, 1973 he was transferred to the Odyssey House in Salt Lake City, Utah. On August 27, 1973 he disappeared. Charges of escape were filed in Salt Lake City Court in September, 1973, which were subsequently dismissed without appellant's knowledge of their existence. On June 11, 1974, appellant's whereabouts became known to Utah Correctional authorities as he was arrested and charged with escape in Texas. These charges were also dismissed. On January 30, 1975, he was returned to the Utah State Prison from Texas. On February 26, 1975, he appeared

before the Utah State Board of Pardons, which rescinded the previously granted parole release date of March 12, 1974.

Appellant was not provided prior written notice of this hearing, he was not advised of the charges against him which the Board of Pardons was to consider, nor the adverse evidence to be presented. Appellant was also not afforded a probable cause preliminary hearing on the charges.

At the hearing conducted February 26, 1975, he was not advised that he could call witnesses or present evidence on his behalf, nor was he allowed to confront and cross-examine adverse witnesses and evidence. He was not provided or permitted the assistance of counsel nor was he advised of his right to consult with counsel prior to the hearing. Following the decision of the Board of Pardons to rescind the previously granted parole release date, appellant was at no time provided with a statement of reasons for the Board's decision and the evidence relied upon in support of that decision. It should be noted at this point that testimony was introduced at the hearing which placed in question appellant's mental condition during the entire period of time subsequent to his disappearance from Odyssey House August 27, 1973. In addition, the record reveals that at no time, either prior or subsequent to the rescission hearing,

have prison disciplinary nor state criminal proceedings been conducted in regards to the disappearance from Odyssey House.

On July 31, 1975, a hearing was conducted on appellant's petition for writ of habeas corpus. The pleadings, memorandum, exhibits and transcript of the proceedings appear in the record on appeal. Uncontroverted testimony was offered as to the particulars of the rescission hearing on February 26, 1975, as outlined above. Subsequent to the hearing, the Honorable Marcellus K. Snow entered Findings of Fact, Conclusions of Law and an Order denying the writ of habeas corpus. The Order and Findings and Conclusions also appear in the record on appeal.

ARGUMENT

POINT I. THE RESCISSION OF AN UNEXECUTED PAROLE RELEASE DATE SUBSEQUENT TO ITS EFFECTIVE DATE IS, FOR CONSTITUTIONAL PURPOSES, THE EQUIVALENT OF PAROLE OR PROBATION REVOCATION, THUS RENDERING THE PROCEDURES USED IN RESCINDING APPELLANT'S PAROLE RELEASE DATE VIOLATIVE OF STATE AND FEDERAL CONSTITUTIONS.

Appellant, in having his parole release date rescinded, suffered a grievous loss. In Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951), the doctrine was enunciated that due process safeguards are mandated whenever there exists

a possibility that a party will suffer a greivous loss as a result of a state action. (concurring opinion). The grievous loss doctrine has been subsequently supported and expanded, establishing that, regardless of whether the claimed interest is defined as a right or privilege, due process procedural protections must be afforded the affected person if a grievous loss may result from the intended state actions. Such protection must also be afforded in a meaningful manner and at a meaningful time. See Goldberg v. Kelly, 397 U.S. 254 (1970), and Fuentes v. Shevin, 407 U.S. 67 (1972).

The grievous loss doctrine was first held by the United States Supreme Court to be applicable to prison and corrections matters in Morrissey v. Brewer, 408 U.S. 471 (1972), a case concerning revocation of parole. Morrissey held that a loss of parole constituted a grievous loss within the meaning of the previously cited cases, and therefore mandated due process safeguards.

The recission of a parole release date at issue in this case, is a determination which represents one of the most critical decisions that could affect an individual's life or liberty, much as the revocation of parole. If recission occurs subsequent to the effective date of an unexecuted parole release date, the result is properly deemed a grievous loss which would require due process safeguards. This follows, as a hearing

conducted for determination of rescission of a parole release date subsequent to such date is in effect a parole revocation hearing. Thus, the two are indistinguishable for constitutional purposes since the hearing was held subsequent to the effective date of the parole release.

The principles of Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, 411 U.S. 778 (1973) are applicable and binding upon such a parole release date rescission hearing. Gagnon concerned probation revocation which was held to be constitutionally indistinguishable from parole revocation for purposes of due process determinations. Therefore, under Morrissey and Gagnon, supra, the minimum requirements of due process of law in rescinding an unexecuted parole release date must include:

- a) Written notice of alleged violations to inmate.
- b) Disclosure to inmate of evidence against him.
- c) An opportunity to be heard and to present evidence and introduce witnesses.
- d) The right to confront adverse witnesses and evidence.
- e) A neutral and detached hearing body.
- f) A written statement by factfinders provided to the inmate giving the evidence relied on and reasons for rescinding the unexecuted parole release date.
- g) A preliminary hearing to determine whether probable cause exists to believe that a violation of the parole release agreement occurred.
- h) That such aforementioned opportunity to be heard must occur within a reasonable time subsequent to the unexecuted parole release date.
- i) That if assistance of counsel is requested and denied, the grounds for such denial must be stated in the record and provided to the inmate.

In addition, the United States Court of Appeals for the Tenth Circuit has previously ordered in a case arising in Utah that a parolee facing possible revocation of his or her parole status is entitled to appointed counsel. Alvarez v. Turner, 422 F.2d 214 (10th Cir. 1970), cert. den., 399 U.S. 916, explained in 478 F.2d 291, 293.

These safeguards are necessary and constitutionally mandated in this case because the rescission by the Board of Pardons of an unexecuted parole release date after its effective date is, in essence a parole revocation proceeding.

As the record below indicates, none of the procedural protections outlined above were provided to appellant prior to or at the hearing at which the unexecuted release date was rescinded (see Transcript of Habeas Corpus hearing, July 31, 1975, pages 15-16, 19, 23, 26-27, 37, 39-40). The nonconformity with constitutionally mandated procedural due process standards was thus substantial.

In response to the noticable lack of procedural protections in this case, respondent has argued 1) that the 18-month delay in conducting the rescission hearing was self-induced by petitioner and 2) that the rescission of the unexecuted parole release date was based upon appellant's "escapee" status. As to the hearing, appellant's disappearance did not have any significant effect upon the failure of the Board of Pardons to rescind his unexecuted parole release date within a meaningful time and in a meaningful manner. No reason has been advanced

why the release date could not have been rescinded promptly after the alleged disappearance of appellant. Respondent attempts to justify the denial of procedural due process standards at the hearing which was eventually conducted February 20, 1975 with the argument that Morrissey and Gagnon, supra, do not apply to rescission hearings. Yet the facts and circumstances of this case indicate that the hearing conducted was, in effect, a parole revocation hearing, differing only in that it was labeled a rescission hearing. This distinction between revocation and rescission was expressly rejected in Lepre v. Butler, 394 F. Supp. 185 (E.D. Pa. 1975):

The terminology of "revocation" or "rescision" is to me of little consequence when considering possible constitutional violations. What is important is the operative fact situation. Id., at 187, Fn.1.

The court in that case held that the rescission of a parole release date constituted a grievous loss, and that the inmate was therefore entitled to substantial procedural protections at the rescission hearing.

As to the basis of the rescission, "escapee" status cannot be used as a justification where there has been no finding of escape. As the record indicates, there has never been a finding of escape, either in criminal proceedings or in correctional disciplinary proceedings. Furthermore, the condition of the parole grant given petitioner was that a violation of

prison rules and regulations could provide the basis for rescinding the grant. To use "escapee status" as a justification for rescission where there has been no finding of escape raises serious due process questions. This is especially true in this case in light of the evidence offered-both at the rescission hearing and at the habeas corpus hearing below-of appellant's mental condition during the period from August, 1973 through January, 1975. Such condition certainly raises question about the mens rea element of "escape" and was thus a conclusion without a finding. (See Transcript of Habeas Corpus hearing, July 31, 1975, pages 9-10, 14, 23, 38).

Because the February 26, 1975 Board of Pardons hearing was, for all practical purposes, a parole revocation hearing in which appellant was denied essential constitutional protections, the trial court below erred as a matter of law in denying appellant's petition. The Order should be vacated and the trial court directed by this court to grant the relief requested by appellant.

POINT II. EVEN IF NOT CONSIDERED THE EQUIVALENT OF PAROLE OR PROBATION REVOCATION, THE PROCEDURES USED IN RESCINDING APPELLANT'S PAROLE RELEASE DATE WERE VIOLATIVE OF STATE AND FEDERAL CONSTITUTIONS.

Subsequent case law interpreting Morrissey and Gagnon, supra, supports the application of essentially the same due

process standards to proceedings involving rescission of an unexecuted parole release date as have been mandated for parole or probation revocation hearings. It has been held that the rescission of an unexecuted grant of parole resulted in a grievous loss within the meaning of Morrissey, and that the due process requirements of Morrissey were therefore applicable with the exception of the preliminary hearing. In re Prewitt, 105 Cal. Rptr. 318, 503 P.2d 1326 (1972), and Means v. Wainwright, 299 So. 2d 577 (Fla. 1974, U.S. Cert. den., 419 U.S. 1116). At least one court has gone a step further, holding that the preliminary hearing requirement of Morrissey must also be afforded prior to a formal rescission hearing. Monohan v. Burdman, 84 Wash. 2d 922, 530 P.2d 334 (1975). Other courts have found that rescission of a parole release date although not of the magnitude of loss of actual parole, constitutes a grievous loss, and that due process standards must still be met although of a lesser degree than Morrissey requires. Lepre v. Butler, *supra*; Karger v. Sigler, 384 F. Supp. 10 (D.Mass. 1974); Jackson v. Wise, 390 F. Supp. 19 (C.D. Calif. 1975); and Godfrey v. Preiser, 80 Misc. 2d 361, 363 N.Y.S.2d 463 (1975).

The case most similar in fact and in principle to the case at bar is Batchelder v. Kenton, 383 F.Supp. 299 (C.D. Calif. 1974), in which the plaintiff's parole release date had been rescinded subsequent to its effective date. The court ruled that the same due process requirements applied to a future

parole release date as did to normal parole revocation. The court also stated that the inmate should have been afforded an adequate opportunity to confront and cross-examine his accusers and be provided with the assistance of counsel. Other cases holding that the assistance of counsel is required at rescission hearings are Godfrey v. Preiser, supra, in which the right to counsel was found to be absolute, and Gee v. Brown, 120 Cal. Rptr. 876, 534, P.2d 716 (1975), opinion as modified on denial of rehearing, 122 Cal Rptr. 231, 536 P.2d 1017 (1975), in which the right to counsel was found to be conditional pursuant to the Gagnon standard for determining the necessity for assistance of counsel. Cf. Williams v. United States Board of Parole, 383 F. Supp. 402 (D. Conn. 1974).

The record below indicates that virtually none of the outlined procedural protections of Morrissey and Gagnon, supra, were afforded to appellant at the rescission hearing. (See Transcript of Habeas Corpus hearing, July 31, 1975, Pgs. 15-16, 19, 23, 26-27, 37, 39-40). Regardless of whether the rescission hearing in this case constituted the equivalent of a parole or probation revocation proceeding, minimal due process standards which were not afforded to appellant are mandated even in the case of rescission.

Indeed, numerous courts have ordered procedural safeguards to be implemented for hearings held by parole authorities at which the mere question of granting a parole release date

to a prisoner is considered. Although less substantial in most cases than those protections ordered in Morrissey and Gagnon, supra, the following cases have resulted in procedural safeguards being ordered which exceed those afforded appellant herein notwithstanding the fact that the plaintiffs in those cases faced a much less immediate and less severe form of deprivation at the hands of the parole authority. Bradford v. Weinstein, 519 F.2d 728 4th Cir. (1974), cert. granted, 95 S.ct. 2394, Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974), United States ex rel Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2nd Cir. 1974, judg. vac. as moot, 42 L. Ed. 2d 289), Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975), and Cummings v. Regan, 45 A.D. 2d 222, 357 N.Y.S. 2d 260 (1974).

The United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974), decided what procedural protections must be afforded to inmates at prison disciplinary hearings at which "good time" credits could be revoked. Although the court declined to fully extend the Morrissey and Gagnon standards to disciplinary proceedings, it held that due process requires that written notice of the charges be given to the inmate prior to the hearing, that at the hearing the inmate should be allowed to call witnesses and present documentary evidence on his behalf and that the inmate be provided a written statement by the fact-finders as to the evidence relied upon and reasons for any disciplinary

action. Though the court declined to rule that assistance of counsel was required, it specifically noted that where the inmate is illiterate or where the issues are too complex for the inmate to effectively represent himself, a counsel substitute should be provided. This is especially significant where the mental condition of the inmate is in question, as in the instant case.

Respondent has argued, and the Conclusions of Law, paragraph 3, provide, that the Morrissey and Gagnon due process guidelines are inapplicable to rescission of parole release date hearings. To reject all of the procedural protections of Morrissey and Gagnon in the face of the guidelines of Wolff v. McDonell, supra, is simply untenable. Two cases, Karger v. Sigler, supra, and Jackson v. Wise, supra, held that the procedural safeguards of Wolff v. McDonell are applicable at rescission hearings. In comparing rescission hearings to disciplinary proceedings, the court in Karger v. Sigler, supra, noted that:

[t]he rescission of a decision to grant parole on a set date certainly works a more immediate change in the conditions of a prisoner's liberty than the loss of good time, and is entitled by the due process clause to at least some procedural protections appropriate under the circumstances. This decision is not based on a determination that parole begins at any particular point in the process, but on the principle that parole is so important to any prisoner that actions depriving him of even a future parole once granted work a grievous loss upon the prisoner. Id., at 12-13.

By failing to provide appellant with even the minimal due process standards applicable to disciplinary proceedings, the rescission of the parole release date constituted a denial of due process of law. On this basis, the decision of the trial court should be vacated and the case remanded with instructions from this court consistent with its opinion.

POINT III. APPELLANT'S PAROLE RELEASE DATE COULD NOT BE RESCINDED SUBSEQUENT TO THE EFFECTIVE DATE OF SUCH RELEASE CONSISTENT WITH THE PROVISIONS OF THE PAROLE GRANT OR WITH STATE AND FEDERAL CONSTITUTIONS.

As stated in the facts, appellant's parole release date was not rescinded until February 26, 1975. The rescission thus occurred nine months subsequent to discovery by Utah authorities of appellant's whereabouts in Texas, over 11 months after the effective date of his release on parole, 17 months after being formally charged with escape in Utah, and 18 months after his disappearance. This delay was unreasonable, and upon the passage of the March 12, 1974, effective date of release, the authority of the Board of Pardons to rescind the date terminated. The language of the parole grant provided:

[t]hat if and in the event you are guilty of any infraction of the rules and regulations of the Utah State Prison or if you shall fail or refuse to perform your assigned duties within the Utah State Prison prior to the date of your release then (emphasis added)

the release date may be rescinded. Thus, a two-pronged test must be met in order to rescind a parole release date. First, one has to either be guilty of an infraction or not perform assigned duties. In this case, appellant has allegedly committed the infraction of escape, but since there has been no showing of guilt by a finding of escape, guilt has not been proven by any standard. Moreover, since appellant was not an inmate at the Utah State Prison at the time of his alleged disappearance, he did not have any duties which he could fail or refuse to perform. Thus neither facet of the first prong of the test is met. Second, the guilt of infraction or nonperformance of duties must be established prior to the date of release. In this case guilt has not been shown at any time, and anything concerning the alleged disappearance which was revealed at the rescission hearing came subsequent to the date of release and beyond the scope of authority of the Board of Pardons as set out in the grant of parole. Once the effective date of parole release passed it could not be rescinded, even though it passed unexecuted. This is not to say that the correctional authorities were without means to attempt to secure the return of appellant to prison. Appellant's return to the Utah State Prison could have been effectuated through a parole revocation proceeding with its added procedural safeguards, thus bringing the hearing up to minimal constitutional standards. Again,

this court should reverse the trial court's order denying appellant's petition.

POINT IV. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE RECORD BELOW, CONSTITUTING REVERSIBLE ERROR IN THE JUDGMENT DENYING APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS.

Subsequent to the habeas corpus hearing conducted below on July 31, 1975, the respondent prepared Findings of Fact and Conclusions of Law which were signed by the Court September 8, 1975. They provided in part, that:

- 1) The rescission of the parole release date was based upon the ground that appellant had been an escapee at the time of the effective date of his parole (Findings of Fact, paragraph 6);
- 2) The rescission of appellant's parole release date by the Board of Pardons was proper and in accordance with law (Findings of Fact, paragraph 13);
- 3) The rescission was proper and in accordance with law and did not deprive appellant of his constitutional right to due process of law in that Morrissey and Gagnon, supra, are inappli-

cable to rescission of parole release date hearings and appellant self-induced the delay of the rescission hearing by being on escapee status when his parole date came due (Conclusions of Law, paragraph 3);

4) There have been no errors or infringements of appellant's constitutional rights because appellant pleaded guilty at the parole rescission hearing (Conclusions of Law, paragraph 4);

5) Appellant's incarceration is legal (Conclusions of Law, paragraph 5).

None of the foregoing findings or conclusions is supported by the record.

As to point 1, the reasons for the rescission do not appear in the record. Further, there was uncontroverted testimony that appellant was never provided with reasons for the rescission (Transcript, page 16, ln. 16-19; page 23, ln. 3-7) and that there was no finding of escape presented to the Board of Pardons to support rescission on the grounds of escape (Transcript page 28, ln. 13-15).

As to the second, third and fifth points going to the legality of the rescission, uncontroverted testimony appears in the record showing that appellant 1) had no prior notice

of the rescission hearing nor was he advised of the charges, (Transcript, p. 15, ln. 3-8; p. 23, ln. 14-21; p. 26, ln. 30 to p. 27, ln. 9; p. 37, ln. 7-17; p. 39, ln. 24-30; p. 40, ln. 22-24); and 2) appellant was not allowed to introduce witnesses on his behalf, to have assistance of counsel, to the right of confrontation, nor was he advised of these rights and the right to introduce evidence on his behalf (Transcript, p. 15, ln. 20 to p. 16, ln. 5; 16, ln. 12-15; p. 19, ln. 1-10; p. 23, ln. 22-24, p. 27 ln. 10-30; p. 40, ln. 1-7, 8-12, and 25-29). The Findings also ignored uncontroverted testimony placing in question the mental condition of appellant at the time of the rescission hearing. (Transcript p. 14, ln. 14-28; p. 23, ln. 25-30; p. 28, ln. 20 to p. 29, ln. 10). In addition, the Board of Pardons did not provide appellant with a statement of reasons for the rescission and the evidence relied upon, nor were reasons given for denying assistance of counsel (Transcript, p. 16, ln. 6-11 and 16-19; p. 23, ln. 3-7). Uncontroverted testimony was offered at the habeas corpus proceeding indicating that a preliminary hearing to determine probable cause for rescission was not conducted (Transcript, p. 15, ln. 9-14) and that no disciplinary or criminal proceedings were taken against appellant concerning his alleged disappearance (Transcript, p. 16, ln. 20-21). Yet the Findings of Fact and Conclusions of Law state that the rescission was "proper", "in accordance with law", did not deprive appellant of consti-

tutional rights to due process of law and that appellant's incarceration is legal.

As to the remainder of the third point, Morrissey and Gagnon, supra, do apply to rescission hearing under the facts and circumstances of this case either directly (Argument, Point I) or in principle (Argument Point II). Also, as is argued in Point I, the alleged disappearance of appellant is not significant in assessing the 18-month delay in conducting the rescission hearing. Further, since there has been no finding of escape, serious due process of law problems are presented here where escape is offered to justify rescission and counter-balance appellant's contention of a denial of due process procedural protections. Thus, the conclusions of "self-induced delay" and "escapee status" are unsupported.

As to the fourth point, it is implied in the Conclusion that the appellant pleaded guilty to escape. Although testimony was offered by witness Cannon that the appellant did plead guilty, Cannon later retracted that testimony and stated that he was not sure if appellant in fact plead guilty to escape (Transcript, p. 38, ln. 12 to p. 39, ln. 2). At no time has appellant plead guilty to escape, nor does it appear so anywhere in the record. Thus it would be clear error to justify the rescission of the unexecuted parole release date on the basis of a guilty plea to escape.

Moreover, appellant's mental competence was questionable at the time of his disappearance from Odyssey House thus rendering very questionable the mens rea element of escape. Without the assistance of counsel at the rescission hearing or even the knowledge that he could consult counsel, appellant was not in a position to even enter a knowing and voluntary plea.

Because of these errors, the Court should reverse the Order of the Court below.

CONCLUSION

Appellant's brief can be summarized as follows:

First, the procedures used in rescinding appellant's unexecuted parole release date did not conform with due process standards for parole or probation revocation. Since the rescission occurred after the effective date of release, it was in effect a parole revocation hearing. Thus, the procedural protections afforded appellant at the rescission hearing were insufficient to satisfy due process of the law under the Constitution of Utah and United States Constitution, rendering the rescission void.

Second, even if the procedural protections to be afforded at rescission hearings are less than in parole or probation revocation, the rescission of an unexecuted parole release date results in a grievous loss and is thus deserving of sub-

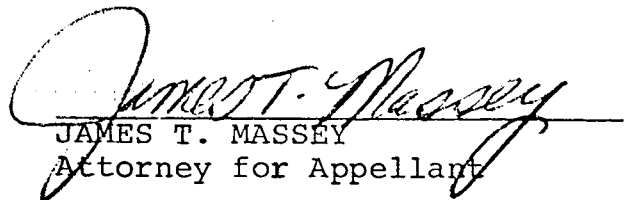
stantial procedural safeguards. The procedural protections afforded appellant at the rescission hearing were not substantial and thus failed to satisfy due process of law under the Constitution of Utah and the United States Constitution, rendering the rescission void.

Third, the parole grant itself provided that the parole release date could be rescinded only prior to the effective date of release. Thus the rescission subsequent to the effective date was beyond the scope of the authority in the parole grant and denied appellant due process of law under the Constitution of Utah and United States Constitution, rendering the rescission void.

Fourth, uncontroverted testimony and evidence demonstrate that the Findings of Fact and Conclusions of Law are not supported by the record below. This constitutes both reversible error and denial of due process of law under the Constitution of Utah and the United States Constitution, rendering void both the trial court's decision and the rescission of appellant's parole release date.

The Order of the court below should be reversed and relief granted to appellant as deemed just and proper.

Respectfully submitted this 5th day of January, 1976.


JAMES T. MASSEY
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Brief of Appellant to Mr. Earl F. Dorius, Assistant Attorney General, State Capitol Building, Salt Lake City, Utah 84114, this 5 day of January, 1976.

James T. Massey

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